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No. 01-618

IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,
Petitioners,

v.

JOHN D. ASHCROFT,
In his official capacity as Attorney General,
Respondent.

BRIEF FOR *AMICI CURIAE* REPRESENTATIVES F. JAMES SENSENBRENNER, JR., JOHN CONYERS, JR., HOWARD COBLE, AND HOWARD L. BERMAN IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI[1]

Amici curiae are the bipartisan leaders of the House Committee on the Judiciary and its intellectual property subcommittee: Reps. F. James Sensenbrenner, Jr., and John Conyers, Jr., the Chairman and Ranking Member of the House Committee on the Judiciary; and Howard Coble and Howard Berman, the Chairman and Ranking Member of the House Committee on the Judiciary's Subcommittee on Courts, the Internet, and Intellectual Property. *Amici* played a major role in securing Congressional passage of the Sonny Bono Copyright Term Extension Act ["the CTEA"], Pub. L. No. 105-298, Title I, 112 Stat. 2827 (1998).

Amici have dual interests in upholding the constitutionality of the CTEA. First, *amici* have an institutional interest in upholding Congressional authority to enact copyright legislation that is consistent with the text and purpose of the Copyright Clause. Second, *amici* have a substantive interest in ensuring that copyright law is responsive to demographic, commercial, and technological changes, both domestically and internationally. Petitioners here would undermine those interests by breaking with centuries of Constitutional tradition and subjecting copyright laws to cramped, formalistic, and ultimately unsustainable interpretations of both Article I, § 8 ["the Copyright Clause"] and the First Amendment.

SUMMARY OF ARGUMENT

This case concerns fundamental copyright policy decisions that, as this Court has consistently recognized, the Framers vested in Congress and not in the courts. In 1998,

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[1] Letters of consent from both parties have been filed with the Clerk of the Court. In accordance with Rule 37.76, *amici* state that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than the *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

petitioners and their supportive *amici* sought to persuade Congress not to extend the term of copyright. Although Congress carefully considered their viewpoints, it rejected them and enacted the CTEA, extending the term of copyright for new and existing works by twenty years. Having failed to persuade Congress of their point of view, petitioners are now seeking to transform their policy disagreement into a legal dispute of purportedly constitutional dimension. Their request should be rejected.

In a significant concession, petitioners do not challenge Congress's power to extend copyright terms *prospectively*—*i.e.*, for works of authorship created after an extension's effective date. "Whether 50 years is enough, or 70 years too much, is not a judgment meet for this Court." Pet. Br. at 14. Rather, they challenge only the power of Congress to extend the term of copyright *retrospectively*—*i.e.*, for works in existence when an extension is enacted. According to petitioners, *any* extension of an existing term necessarily violates the "Progress," "limited Times," and originality requirements of the Copyright Clause, and cannot pass the purportedly applicable First Amendment scrutiny. To petitioners, the actual length of the extension—be it twenty days or twenty years—is irrelevant, for "[t]he line between *prospective* and *retroactive* extensions is a clear one." Pet. Br. at 14.

The problem with the "line" petitioners wish to draw is that, while it is "clear," it finds no support in the Constitution. Indeed, petitioners' "clear line" would eviscerate two centuries of constitutional tradition by invalidating an act of the First Congress in 1790, as well as a dozen successive copyright acts—none of which have been found to exceed the Constitution's grant of authority to Congress.

1. The CTEA's extension of the terms of existing works promotes "Progress" and otherwise satisfies the requirements of the Copyright Clause. In periodically expanding the scope of copyright to respond to changes in commerce, demographics, and technology, Congress has most often protected both future *and existing* copyrights. This Court has consistently recognized Congress's institutional authority to promote such progress, and has never suggested (nor has any court ever held) that protecting *existing* copyrights exceeds that authority.

Petitioners assert that the authority of Congress to promote progress exists for one purpose only: to induce the creation of *new* works. But the Framers' view was not so constricted. Of course, *amici* acknowledge that the grant of power under the Copyright Clause is not absolute, and that the Clause—and this Court's cases—place limits on the exercise of Congress's copyright power. *Amici* disagree with petitioners, however, over the contours of those limits, and the scrutiny with which this Court should analyze those Congressional enactments.

Each of petitioners' arguments against the extension of the term of copyright to existing works was carefully considered during a legislative process that stretched over several years; however, these arguments were ultimately rejected by the body that the Framers determined should make such decisions: Congress. Thus, the CTEA reflects the considered judgment of Congress that extending *existing* copyright terms in the face of meaningful changes in commerce, demographics, and technology would promote progress by: (1) encouraging authors to create derivative works; (2) providing incentives to create new works; (3) preserving existing works; (4) disseminating existing works; and (5) harmonizing United States copyright protection with that of our major trading partners. It therefore satisfies the dictates of the Copyright Clause.

2. The CTEA creates no conflict with the First Amendment. *Amici* recognize that the Constitution's speech-protecting principles place limits on the reach of Congress's copyright protecting power. But this Court has held that, as long as copyright protects only expression, not ideas, and makes even expression subject to "fair use" by other speak-

ers, it strikes a "definitional balance" with the First Amendment. The CTEA reflects Congress's careful efforts to maintain this balance. On that, petitioners cannot disagree. Instead, they urge the overlay of intermediate scrutiny on top of this definitional balance. However, their argument ignores the unique ways in which speech interests are affected by the intersection of the Copyright Clause, copyright legislation, and the First Amendment. Their argument also ignores the established speech-protecting limits to which copyright is already subject. In the final analysis, the CTEA is a permissible exercise of Congress's power, reflecting a policy choice by Congress setting the duration of copyright, and respecting the idea/expression dichotomy and the fair use doctrine. The overlay of intermediate scrutiny here is thus both unwarranted and unworkable.

In short, the CTEA is a core exercise of Congress's power under Article I of the Constitution. It promotes progress, creates an engine of free expression, and strikes a definitional balance with the First Amendment. Accordingly, it should be upheld.

ARGUMENT

Petitioners imply that the CTEA is a piece of narrow, special interest legislation, passed under cover of darkness, without careful consideration. That is simply not so. The CTEA was the product of years of legislative consideration, numerous hearings, and a 1993 study by the Copyright Office on the duration of copyright (which itself followed an extended public comment period). *See Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989, H.R. 1248, and H.R. 1734 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong. 182-83 (1995) ["1995 House Hearings"] (Statement of Marybeth Peters, Register of Copyrights ("Peters statement")). In enacting it, Congress was mindful of the scope of its constitutional responsibility. *See*

144 Cong. Rec. H1459 (Mar. 25, 1988) (remarks of Rep. Sensenbrenner). Congress took into account the public's interest in the public domain, and specifically considered the issues raised by petitioners here. Congress also considered the various issues raised by the *amici* supporting petitioners.[2] Congress not only listened to these concerns; it wrote the CTEA to address many of them.[3]

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[2] Congress heard the concerns of the libraries, archivists, and digital database creators who criticized a twenty-year postponement of works entering the public domain. *See, e.g.*, 1995 House Hearings at 182-204, 676-679. Congress also heard the concerns of scholars, museums, teachers and artists who noted the practical difficulties of finding successors-in-interest to old copyrighted materials of academic importance. *See, e.g., The Copyright Term Extension Act of 1995: Hearings on S. 483 Before the Senate Judiciary Comm.*, 104th Cong. 18 (1995) ["1995 Senate Hearings"]. Congress heard concerns about preserving older works, including motion pictures. *See, e.g.*, 1995 House Hearings at 64-73, 281-89, 423-502. Congress heard from intellectual property law professors, who address to this Court their disagreements with the policy balance Congress struck. *See, e.g., id.* at 290-311 (statement of Professor Karjala on behalf of the U.S. Copyright and Intellectual Property Law Professors). And Congress listened to extensive testimony from Professor Peter Jazsi, the author of the Brief of *Amici Curiae* National Writers Union, Charles Baxter, Wendell Berry, *et al.* *See, e.g.*, 1995 Senate Hearings at 71-90, 123-27.

[3] For example, the CTEA extended the termination rights found in 17 U.S.C. § 102(d) to readjust the balance between authors/heirs and current copyright owners. CTEA, Title I, § 103, 112 Stat. at 2829. The CTEA also amended 17 U.S.C. § 108 to give libraries, archives, and nonprofit educational institutions a defined right to reproduce, distribute, display, or perform (even digitally) works that are in their last twenty years of copyright for purposes of preservation, scholarship, or research, particularly in situations where the work is not being commercially exploited or copies cannot be obtained at a reasonable price. *See id.*, § 104, 112 Stat. 2829. That amendment created a "carefully crafted, balanced library exemption that ensures that the legitimate needs of the libraries are met." 144 Cong. Rec. at H1465 (Representative Conyers). And Congress, led by the efforts of Representatives Sensenbrenner and McCollum, enacted provisions to protect the use of copyrighted works by

(footnote continues on next page)

In so doing, Congress fully considered the costs of term extension. *See, e.g.*, 1995 House Hearings at 86. But Congress—quite rightly—also considered the costs of *failing* to enact term extensions. *Cf. Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 599 (1994) (Kennedy, J., concurring) (the "underprotection of copyright [can] disserve[] the goals of copyright just as much as overprotection"). After weighing these issues, Congress enacted the CTEA and extended the term of copyright for new *and* existing works.

Petitioners and their *amici* disagree with the balance Congress struck. That is their prerogative. But those disagreements are over matters of policy that the Founders entrusted to Congress—not matters of constitutional law. *See* Brief of George A. Akerlof, Kenneth J. Arrow, Timothy F. Bresnahan, James M. Buchanan, *et al*. As explained in the sections that follow, petitioners' arguments to the contrary are incompatible with the text, structure, and history of the Copyright Clause and with Congress's exercise of its power under that Clause. As such, their challenge to the CTEA should be rejected, and the judgment of the Court of Appeals should be affirmed.

I. THE CONSTITUTION VESTS IN CONGRESS BROAD AUTHORITY TO "PROMOTE THE PROGRESS OF SCIENCE."

The Copyright Clause authorizes Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. Art. I, § 8, par. 8. This power over patents and copyrights is vested in *Congress*—not the courts, the Executive, or the

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small businesses. Fairness in Music Licensing Act of 1998, Pub. L. No. 105-298, Title II, 112 Stat. 2827 (1998).

states. *See Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

The authorization of power in the Copyright Clause is based on Congress's "institutional ability" to draw the "difficult balance between the interests of authors and inventors" and "society's competing interest in the free flow of ideas, information, and commerce." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429, 431 (1984). Decisions over the scope and duration of intellectual property are generally resolved "within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot." *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980) (patents). Such decisions require "the balancing of competing values and interests, which in our democratic system is the business of elected representatives." *Id.* Accordingly, the question of how long a copyright (or patent) term should endure is committed "to the discretion of Congress." *Pennock v. Dialogue*, 27 U.S. (2 Pet.) 1, 17 (1829) (patents); *Parker v. Flook*, 437 U.S. 584, 595 (1978) (Congress should answer the "[d]ifficult questions of policy concerning … the form and duration of [patent] protection").

Petitioners are incorrect to suggest that Congress may constitutionally exercise its authority to promote progress for one purpose only—to induce the creation of *new works*. Pet. Br. at 15-16. While encouraging the creation of new works is certainly a paradigm purpose of copyright, it is not the *only* constitutionally permissible purpose for Congress to consider. This Court has repeatedly confirmed that, in promoting "Progress" under the Copyright Clause, Congress can consider the whole gamut of "innovation, advancement or social benefit" the public may obtain from copyright. *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966); *see also Fox Film Corp.*, 286 U.S. at 127 (the monopoly is justified by the "general benefits derived by the public from the labours of authors"). Copyright, as an "engine of free expression,"

"supplies the economic incentive to ... *disseminate ideas*." *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (emphasis added). Thus, Congress is constitutionally permitted to consider all of the ways copyright may "serve the cause of promoting broad public availability of literature, music, and the other arts." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).[4]

Because the Constitution vests in Congress broad power to promote progress under the Copyright Clause, this Court's review of the exercises of that power has been consistently deferential. On a number of occasions, the Court has specifically rejected attempts—like this one—to substitute restrictive views of "Progress" for those reflecting Congress's reasoned judgments. *See Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 529-30 (1972) ("direction of Art. I is that *Congress* shall have the power to promote the progress of science and the useful arts") (emphasis in original); *Stewart v. Abend*, 495 U.S. 207, 228 (1990) (balancing costs and benefits of copyright law is "better addressed by Congress than the courts"); id. at 230 ("it is not our role to alter the delicate balance Congress has labored to achieve").

The Court of Appeals acted consistently with this precedent by asking—and answering in the affirmative—whether the CTEA "is a 'necessary and proper' exercise of the power conferred upon the Congress by the Copyright Clause." *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001). In so doing, the court tracked closely the directive of *McCulloch v. Maryland*, finding that "the CTEA [is] an 'appropriate' means, and 'plainly adapted' to the end prescribed in the

[4] The Brief of Intellectual Property Law Professors as *Amici Curiae* Supporting Petitioners ("IP Br.") confirms this view, arguing that the "Framers intended the Copyright and Patent Clause to give Congress the power" not only "to encourage the creation" of writings, but also "to encourage ... the broad dissemination, and widespread use of writings." IP Br. at 8.

preamble [of Article I, § 8]." *Id.*; *cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end . . . . are constitutional.").[5]

This standard of review correctly balances Congress's broad powers to promote progress under the Copyright Clause with the outer limits to which those powers are subject. With respect to those outer limits, we agree with petitioners that the Copyright Clause does not support the creation of trademark law, *see Trade-Mark Cases*, 100 U.S. 82 (1879), recognize a common law right, *see Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), or authorize the grant of exclusive rights for the creation of unoriginal works, *see Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 346 (1991). These limits define the subject matter Congress may regulate under the Copyright Clause, and thus create logical stopping points for the exercise of Congress's power. But, within these recognized limits, this Court has always allowed "Congress [to] implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim." *Graham*, 383 U.S. at 6; *see also Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 168 (1989) ("It is for Congress to determine if the present system . . . is ineffectual in promoting the useful arts . . . "). Thus, this Court at once properly places clear outer limits on the protectible subject matter of copyright, while deferring to Congress's decisions regarding how best to promote progress through regulating that protectible subject matter.

[5] Other courts have similarly recognized that their "role in judging whether Congress has exceeded its Article I [copyright power] is limited ... by the lenient standard of *McCulloch*." *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 860 (5th Cir. 1979).

II. THE EXTENSION OF EXISTING COPYRIGHTS UNDER THE CTEA PROMOTES "PROGRESS" AND CLEARLY FALLS WITHIN CONGRESS'S POWER UNDER THE COPYRIGHT CLAUSE.

A. Congress Appropriately Concluded That The CTEA's Extension Of Existing Copyrights Promotes The Progress Of Science.

Petitioners argue that the extension of an existing copyright cannot possibly "promote the Progress of Science" because "the incentive is being given for work that has already been produced." Pet. Br. at 22. In their view, "[r]etroactive extensions cannot 'promote' the past." *Id.* However, Congress's conclusion to the contrary is more consistent with history—and with common sense. There is no historical evidence that the Framers intended to require Congress to promote progress in any pre-ordained fashion. *See* Edward C. Walterscheid, *Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause*, 7 J. Intell. Prop. L. 315, 320 (2000) (the "Framers desired to give Congress authority to engage in the patent and copyright practice that had long been followed in England, but with discretion to modify it to meet American circumstances"). To the contrary, the Constitution recognizes that "[s]uccessive ages have drawn different balances among the interest of the writer in the control and exploitation of his intellectual property, the related interest of the publisher, and the competing interest of society in the untrammeled dissemination of ideas." *Sony*, 464 U.S. at 431 n.12 (quoting Foreword to B. Kaplan, An Unhurried View of Copyright vii-viii (1967)). The Constitution vests in Congress the "constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated" by new circumstances or new technologies, *id.* at 431, and Congress may promote the progress of science "by selecting the policy which *in its judgment* best effectuates the

constitutional aim." *Graham*, 383 U.S. at 6 (emphasis added).[6]

Here, as set forth in the CTEA's legislative history, Congress used its "judgment" in recognizing at least five ways in which the extension of existing copyright under the CTEA promotes the "Progress of Science." In the end, petitioners' disagreement with that judgment is a disagreement over the policy decision Congress made, and does not render the law unconstitutional.

1. Creating Derivative Works.

Congress determined that the CTEA's extension of existing copyright provides incentives for *existing* copyright holders to create important "derivative" works that would otherwise never be created. Congress recognized that "companies are more likely to invest resources in creating sequels or remakes of existing works if they know that the expiration of the copyright in the *original work* is more than twenty years in the future." 1995 House Hearings at 583 (Letter from Professor Paul Goldstein, Stanford Law School) (emphasis added).[7] Such incentives to create derivative works promote progress by furthering the dissemination of ideas and knowledge. S. Rep. No. 104-315, at 11-12 (1996); *see*

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[6] Petitioners argue that Congress must exact a new *quid pro quo* every time it decides to alter the scope or duration of existing intellectual property rights. Pet. Br. at 16. The cases petitioners cite, however, refer to the general benefits that a copyright regime is meant to serve. *See, e.g., Graham*, 383 U.S. at 6; *Brenner v. Manson*, 383 U.S. 519, 534 (1966); *Trade-Mark Cases*, 100 U.S. at 94; *Pennock*, 27 U.S. at 23. They do not define "Progress" in the narrow way petitioners suggest.

[7] *See also* 1995 House Hearings at 669 (incorporating article by Lisa M. Brownlee, The EC Term Directive, the Uruguay Round Agreements Act, and the Proposed U.S. Copyright Term Extension Act of 1995 (1995)) ("An author's incentive to create derivative works based upon pre-existing works is greatly increased if the underlying works are protectible.").

also generally Stewart, 495 U.S. at 228 (discussing the value to authors of derivative works); *compare Campbell*, 510 U.S. at 590 (1994) (in evaluating a person's right to make fair use of a copyrighted work, the Court must consider the "harm to the market for derivative works").

Petitioners do not deny the importance of derivative works. In fact, they extol the value of derivative works. Pet. Br. at 5-6 (describing petitioners' desires to "build upon and use content" from copyrighted work to create "derivative works"). But they seek to create those works without permission from, or payment to, the author. They believe that early expiration of existing copyrights will lead to the creation of more, or more important, derivative works than those created by existing copyright holders protected by term extension. Congress concluded the opposite—that "[f]ew are willing to make . . . significant expenditures for the creation of derivative works if they will have to compete with other derivative works based on the same underlying work. Therefore, the public is more likely to see high caliber derivative works if they are based on copyrighted works and made under authorization from the copyright proprietor." 1995 House Hearings at 633-34 (joint statement of the Coalition of Creators and Copyright Owners). That policy decision was amply supported by the record—and is emphatically one for the Congress, not the courts, to resolve.

2. Creating Future Works.

Congress also believed that the CTEA's extension of existing copyrights would lead to the creation of new works by *enabling* authors to create those works. Petitioners focus exclusively on the fact that term extension cannot *incentivize* the creation of a "work that has already been produced" because "[r]etroactive extensions cannot 'promote' the past." Pet. Br. at 22. Petitioners' argument, again, is grounded in a policy disagreement—not constitutional law. It is also decidedly incorrect.

Congress correctly understood that the decision to create a new work does not depend solely on the direct incentives provided for future works, but also on the existence of *present resources* to fund future creation. Fewer than ten percent of the members of the American Society of Composers, Authors, and Publishers earn their living full-time from their music, and many of those who do make under $10,000 a year. *See* 144 Cong. Rec. H1461-62 (Mar. 25, 1988). A copyright regime that fails to provide adequate compensation has "a chilling effect on the decision of our creators to continue to practice their craft." *Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; and Copyright per Program Licenses: Hearings Before the Subcomm. On Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 134 (1997) [1997 House Hearings].[8] By contrast, a regime that extends the term of existing copyrights "provide[s] additional income that would finance the production and publication of new works" by those with existing copyrights. 1995 House Hearings at 158 ("Peters statement").

The additional income provided by term extension also benefits larger institutional creators and publishers of copyrighted works. *See* 1995 House Hearings at 583 (letter from Professor Paul Goldstein, Stanford Law School) ("The great majority of motion pictures fail to repay their budgets and motion picture companies must rely on profits from block-

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[8] *See also* 1995 Senate Hearings at 44 (statement of Alan Menken) ("There comes a point in most people's lives when one must make a practical decision about the choice of a career. The continuing ability to provide for one's family both during and after one's lifetime would certainly be a factor. If it becomes clear that insufficient copyright protection is available to provide that support, there will be less incentive to try to make one's living as a creator.") *See generally CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports*, 44 F.3d 61, 69 (2d Cir. 1994) (copyright enables authors to "earn a living from the creations that benefited the public").

busters and even medium successes to balance these losses. By increasing the value of their libraries overall, term extension can give them revenue to produce new films during the extension period."). Additional income enables institutional creators and publishers "to finance the production of marginal works and those involving greater risks," such as those by "young or emerging authors" or more "serious [works]" that are "less popular." S. Rep. No. 104-315, at 12-13; 1995 House Hearings at 196 (Peters statement). The term extensions in the CTEA thus facilitate the creation of original expression, both by individual authors and institutional creators and publishers. *See* 144 Cong. Rec. H1459, 1461 (March 25, 1988). "[T]he ultimate beneficiary is the public domain, which will be greatly enriched by the added influx of creative works over the long term." S. Rep. No. 104-315 at 12-13.

3. Preserving Existing Works.

Congress further concluded that extending the term of existing copyrights also promotes the progress of science by "providing enhanced economic incentives to preserve existing works," thereby enhancing the "long-term volume, vitality, and accessibility of the public domain." *Id.* at 3, 13. Extension is necessary given the high costs associated with the preservation of many works—most notably motion pictures:

> Because digital formatting enables the creation of perfect reproductions at little or no cost, there is a tremendous disincentive to investing the huge sums of money necessary to transfer these works to a digital format, absent some assurance of an adequate return on that investment. By extending the current copyright term for works that have not yet fallen into the public domain, including the term for works-made-for-hire (*e.g.*, motion pictures), the bill will create such an assurance.... More important, the American public will benefit from having these cultural treasures available in an easily reproducible and indelible format.

Id. at 13.[9]

Once again, petitioners' arguments to the contrary reflect nothing more than a basic policy disagreement. Petitioners point to the Brief of Hal Roach Studios & Michael Agee as Amici Curiae Supporting Petitioners ["Agee Brief"] to argue that the extension of copyright terms undermines restoration and preservation efforts. (Pet. Br. at 31-32.) The Agee Brief, however, supports Congress's judgment that the preservation and storage of deteriorating film is costly. *Id.* at 13. While the Agree Brief ultimately disagrees with Congress's determination of the best means to achieve that end, that disagreement only reinforces the point that this is a policy dispute, not a legal one.[10] Congress reasonably found that extending the terms of existing copyrights would promote progress by creating incentives to preserve existing works. There is no legal basis present here to disturb that decision.

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[9] *See also* 1995 House Hearings at 52 (statement of Jack Valenti) ("The quality of the print is soon degraded. And there is no one around who is going to invest the money for enhancement. Why? Because there is no longer a financial incentive to rehabilitate and preserve because it belongs to everybody and therefore it belongs to nobody. A public domain work is an orphan. . . . No one is responsible for its future life. But everyone exploits its use until that time certain when it becomes soiled and haggard and barren of all of its former virtues.").

[10] Allowing libraries to distribute or exhibit a work is unlikely to lead to the recoupment of the high preservation costs if everyone— including those who have made no investment—can freely distribute and exhibit the work. The Agee Brief's desire to vest rights in libraries and archives instead of the copyright owners is a policy decision best left to the discretion of Congress and certainly not mandated by the Constitution or the goal of "Progress."

4. Disseminating Existing Works.

The CTEA also promotes progress by facilitating the dissemination of existing copyrighted works. Congress concluded that term extensions of existing copyrights would create incentives for further distribution of original work. H.R. Rep. No. 105-452 at 4 (1998) (extending "copyright protection will be an incentive for U.S. authors [to] ... further disseminate them to the public"). That conclusion is well supported in the legislative record.

Disseminating a copyrighted work in a high-quality form requires considerable investment by a copyright holder. *See* 1995 House Hearings at 633 (joint statement of the Coalition of Creators and Copyright Owners) (the "costs of quality production, distribution and advertising, and changing technology, all require a major investment"). This is particularly true today, when a copyright holder seeks to make works available in the new media that have emerged in the digital era. *See id.* at 593 (letter from Shira Perlmutter, Catholic University of America). A copyright holder nearing the end of a copyright term may simply choose not to make the investment in disseminating original work in a high-quality form. *Id.*

Congress made the right policy decision. The "only products that do tend to be made available after a copyright expires are 'down and dirty' reproductions of such poor quality that they degrade the original copyrighted work." *Id.* at 602 (commentary by Arthur R. Miller). By contrast, the works of a copyright holder with an additional twenty years of protection "are far more likely to be made widely available to the public in a form the public wants to enjoy." *Id.* at 633. Congress had strong empirical support for reaching these conclusions. *Id.* at 212 (statement of Bruce A. Lehman discussing effect of NAFTA on older works). Progress is promoted when works are affirmatively brought "to the consumer who may enjoy it at a movie theater, at a home, in a car, or in a retail establishment." 144 Cong. Rec. H1458

(statement of Representative Coble). "Without that exploitation, a work may lie dormant, never to be discovered or enjoyed." *Id.*

5. Harmonization.

Petitioners minimize Congress's interest in "harmonizing" the copyright terms with those of the European Union, arguing that certain aspects of United States and European copyright law remain different, and that term extension exacerbates global disharmony. Pet. Br. at 42-43. Petitioners also argue that lowering the "transaction costs for commercial use of copyrighted work" in Europe, *id.* at 42, cannot justify the CTEA. But petitioners ignore a key rationale behind this legislation; "harmonizing U.S. copyright law to that of the European Union" ensures "the continued economic benefits of a healthy surplus balance of trade in the exploitation of copyrighted works." S. Rep. No. 104-315, at 3.[11] Representative Conyers explained this important objective during the Congressional debate:

> [Term extension] will allow the United States to keep pace with the copyright terms of European countries.... The world loves American-made

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[11] The Court of Appeals agreed, concluding:

> The Act matches United States copyrights to the terms of copyrights granted by the European Union ... in an era of multinational publishers and instantaneous electronic transmission, harmonization in this regard has obvious practical benefits for the exploitation of copyrights. This is a powerful indication that the CTEA is a "necessary and proper" measure to meet contemporary circumstances . . . the force of that evidence is hardly diminished because, as the dissent correctly points out, the EU is not bound by the Copyright Clause of our Constitution.

Eldred, 239 F.3d at 379.

> music, movies, computer software and books. Creators of these works should not be placed at a competitive disadvantage in overseas markets. By acting on copyright extension, Congress will be furthering American innovation and protecting American jobs.

144 Cong. Rec. at H1465. As Representative Sensenbrenner recognized, that interest is satisfied by term extension, which "ensures that one of America's most valuable assets will continue to dominate in global markets." *Id.* at H9949 (Oct. 7, 1998).

Thanks in large part to strong copyright law, entire industries devoted to the creative process, consisting of individual authors, publishers, distributors, and partnerships, have emerged in the United States. *See* 144 Cong. Rec. at H9951 (copyright "products such as movies, software, music and books contributed more than $275 billion to the U.S. economy in 1996 and employed more than 6½ million workers"). Fostering these creative industries promotes the progress of science.

B. Petitioners' *Per Se* Rule Is Unsupported By The "Limited Times" And Originality Requirements.

Petitioners also erroneously claim that a *per se* rule against extensions of existing terms can be found in the "limited Times" and originality requirements of the Copyright Clause. Rather than repeat the many arguments of the government and other *amici* refuting this claim, *amici* will address three key reasons why petitioners are wrong.

First, the CTEA was not, as petitioners claim, an attempt to "evade [the limited Times] constitutional constraint." Pet. Br. at 10. Congress considered the risk of perpetual copyright, and recognized that the Constitution "clearly precludes Congress from granting unlimited protection for copyrighted works." S. Rep. No. 104-315 at 11; *see also* 1995 House

Hearings at 94 (Representative Berman). Congress expressly disclaimed any intention to take "a step down the road of perpetual copyright protection." S. Rep. No. 104-315 at 11. Rather, the CTEA was enacted to adhere to the "emerging international standard," which itself is not moving "toward perpetual protection, but to a fixed term of protection based on the death of the author." *Id.* Indeed, Congress explained that the driving principle behind the CTEA "remains unchanged" and limited—copyright should "protect the author and at least one generation of heirs." *Id.* The CTEA "merely modifies the length of protection in nominal terms" to better reflect this principle in light of "scientific and demographic changes." *Id.* There is no question, then, that the CTEA grants exclusive rights to authors "for limited Times," as the Constitution requires. *See* U.S. Const. art I. § 8.[12]

Second, the Framers rejected petitioners' view that copyright should be limited to a single "fixed" time, Pet. Br. at 17, and instead authorized Congress to establish copyright for "limited times." The notes of the debates from the Constitutional Convention indicate that the Framers rejected numerous constructions that would have limited copyright terms to "a limited time" or "certain time." James Madison, *Notes on Debates in the Federal Convention of 1787* (entry for August 18, 1787). James Madison proposed "To secure to literary authors their copy rights for a limited time." *Id.* Charles Pinckney suggested: "To secure to Authors exclusive rights for a certain time." *Id.* And Thomas Jefferson

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[12] "[L]imited" connotes "confine[ment] within limits" and a state of being "restricted in extent, number, or duration." *Webster's Third New Int'l Dictionary* 1312 (1993). To be limited, something must be "circumscribed within definite limits, bounded, [or] restricted." *The Compact Oxford English Dictionary* 966 (2d ed. 1999). Accordingly, Congress has the power to grant exclusive rights only for times that are "confine[d]" and "restricted in extent, number, or duration."

urged adoption of even more restrictive language: "Monopolies may be allowed to persons . . . for a term not exceeding—years but for no longer term & no other purpose." *5 Writings of Thomas Jefferson* 113 (Ford ed., 1985). The Framers, of course, rejected these alternatives, instead allowing Congress to protect rights for "limited times." The CTEA complies with this requirement.

Third, with regard to originality, the CTEA does not resurrect any works that have already entered the public domain; nor does it run afoul of this Court's decision in *Feist Publications Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), that "facts" and "ideas" are not copyrightable. Petitioners may make use of any fact or idea contained in any work the CTEA protects. Nothing in *Feist*, however, prohibits Congress from adjusting the terms of existing copyrights in order to better promote the progress of science.

C. Petitioners' *Per Se* Rule Would Undermine Two Centuries Of Unbroken Constitutional Tradition Concerning Congress's Copyright Power.

Petitioners' *per se* argument, if accepted, would invalidate more than a dozen copyright extension acts adopted by Congress over the last two centuries, and would contradict the long-standing and well-established historical practice permitting Congress to readjust the terms of existing copyrights in order to respond to changing circumstances.[13] Petitioners' *per se* rule would even invalidate the original copyright statute adopted by the First Congress, the 1790 Act, which granted to "any other person or persons ... who hath or have purchased or legally acquired the copyright of any such map, chart, book or books" a *new* and exclusive fourteen-year copyright term, eligible for renewal if the copyright holder survived the term. Act of May 31, 1790, § 1, 1 Stat. 124 (1790).[14]

This Court, however, has made clear that "[t]he actions of the First Congress ... are [themselves] persuasive evidence of what the Constitution means." *Harmelin v. Michigan*, 501 U.S. 957, 980 (1991). That petitioners' approach would *also* invalidate numerous similar Congressional enactments passed over the next two centuries is overwhelming evidence that it is in error:

> The construction placed upon the Constitution by the first act of 1790, and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great

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[13] *See* Copyright Act of 1976, Pub. L. No. 94-553, §§ 106–109, 301–304, 90 Stat. 2541 (1976) (extending the existing copyright term for twenty years); Act of December 31, 1974, Pub. L. No. 93-573, 88 Stat. 1873 (1974) (two-year retroactive extension); Act of October 25, 1972, Pub. L. No. 92-566, 86 Stat. 1181 (1972) (two-year retroactive extension); Act of November 24, 1971, Pub. L. No. 92-170, 85 Stat. 490 (1971) (one-year retroactive extension); Act of December 17, 1970, Pub. L. No. 91-555, 84 Stat. 1441 (1970) (one-year retroactive extension); Act of December 16, 1969, Pub. L. No. 91-147, 83 Stat. 360 (1969) (one-year retroactive extension); Act of July 23, 1968, Pub. L. No. 90-416, 82 Stat. 397 (1968) (one-year retroactive extension); Act of November 16, 1967, Pub. L. No. 90-141, 81 Stat. 464 (1967) (one-year retroactive extension); Act of August 28, 1965, Pub. L. No. 89-142, 79 Stat. 581 (1965) (two-year retroactive extension); Act of September 19, 1962, Pub. L. No. 87-668, 76 Stat. 555 (1962) (three-year retroactive extension); Act of March 4, 1909, § 24, 35 Stat. 1075, 1080-81 (1909) (up to fourteen-year retroactive extension authorized for certain works); Act of Feb. 3, 1831, 4 Stat. 436 (1831) (up to fourteen-year retroactive extension authorized for certain works); Act of May 31, 1790, 1 Stat. 124 (1790) (authorizing a fourteen-year term for all works, including those works already under existing copyright terms for up to seven years).

(footnote continues on next page)

[14] Prior to the 1790 Act, no federal copyright existed. Yet, granting new federal protections to those works previously protected under state copyright law would plainly violate petitioner's *per se* rule because Congress required no *quid pro quo* for the new federal protections, as petitioners' view would require.

> weight, and when it is remembered that the rights thus established have not been disputed during a period of [over two centuries], it is almost conclusive.

Burrows-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884).

Petitioners try to discount the significance of the 1790 Act as an aberration that "stands for nothing more than the need of the First Congress to address fundamental issues of transition from a state federation to a national government." Pet. Br. at 29. But petitioners fail to explain why Congress should not be allowed to address other significant changes affecting copyright, such as those involving demographics, commerce, and technology. Moreover, petitioners' argument that the federal grant under the 1790 Act can "be understood as a *compensation* for the expected displacement of a state-protected right," *id.*, does not change the fact that the first Congress *extended* the copyright for works that were already in existence (as opposed to simply replicating the remaining state-law terms). Thus, petitioners effectively confirm Congress's authority to adjust the duration of existing copyrights in order to promote a broad range of purposes.

In any event, there is nothing in the legislative history of the 1790 Act indicating that Congress was granting itself a one-time-only exemption to readjust the scope and duration of existing copyrights—or that the Constitution created such a distinction—and the practices of other early Congresses suggest the contrary. Those Congresses recognized their continuing authority to readjust copyrights and patents in order to meet the ends of Article I, § 8. *See generally* Brief *Amici Curiae* of Tyler T. Ochoa In Support of Petitioners at 22-24 (early Congresses understood that they could extend

patent and copyright terms for "equitable" and "utilitarian" reasons).[15]

Finally, even if the acts of early Congresses had not made the Framers' intent so clear, interpreting the Copyright Clause to require a fixed term that can never be changed would provide a meaningless limit on Congress's power. Under petitioners' view, Congress could not extend existing copyrights for even a day; at the same time, Congress could set a one-time term of 500 years, as long as the term established were never changed. Such an inflexible view is contrary to the purposes of the Copyright Clause and would place a constitutional straightjacket on future Congresses, making them powerless to prevent any further decay in the strength of copyright law.

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[15] Other examples include Congress's action, in 1808, to extend by private act the term of a patent owned by Oliver Evans. *See* An Act for the Relief of Oliver Evans, ch. 13, 6 Stat. 70 (1808). Similarly, in 1828, Congress extended the copyright of James Rowlett. *See* An Act to Continue the Copy-Right to John Rowlett, ch. 145, 6 Stat. 389 (1828). In 1831, Congress extended the existing copyright term to twenty-eight years "from the time of recording the title thereof," and allowed surviving widows or children of deceased authors to renew the term for an additional fourteen years. Act of Feb. 3, 1831, §§ 1, 2, 4 Stat. at 436-37. And in 1836, Congress permitted *existing* patent-holders to follow a specified procedure in seeking to extend the length of a patent term by seven years. *See* Act of July 4, 1836, ch. 357, §§ 5 & 18, 5 Stat. 117, 117, 124-25 (1836). *Cf.* Tyler T. Ochoa, *Patent and Copyright Term Extensions and the Constitution: A Historical Perspective*, 49 J. Copyright Soc'y USA 19, 124-25 (2001) (the view that "retroactive term extension is absolutely forbidden" has "appealing simplicity," but "is difficult to maintain in light of the long history of patent term extensions which were upheld in the mid-nineteenth century").

III. CONGRESS'S EXERCISE OF ITS COPYRIGHT POWER TO EXTEND THE TERM OF EXISTING WORKS DOES NOT INVOKE HEIGHTENED SCRUTINY UNDER THE FIRST AMENDMENT.

Petitioners also challenge the CTEA on the ground that it violates the First Amendment, Pet. Br. at 33-47, arguing that it, "like all regulation that allocates the right to speak," is subject to intermediate scrutiny under the standard set forth in *Turner Broadcasting Systems v. FCC*, 520 U.S. 180 (1997)—and that the CTEA fails this test. *Id.* at 39. While petitioners only directly challenge the constitutionality of the CTEA's term extension of existing copyright, their argument for the application of intermediate scrutiny would also apply to Congress's prospective protections of copyrights, and to all other copyright laws—past, present, and future. *See id.* at 38-39. This position cannot be squared with the historic exercise of Congress's power under the Copyright Clause, the First Amendment, or the decisions of this Court related to both constitutional provisions.

Copyright statutes such as the CTEA are not, of course, immune from all First Amendment considerations. In *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), this Court held that core exercises of Congress's copyright power "strike[] a definitional balance" with the First Amendment. 471 U.S. at 556 (citation quotations omitted). For example, this Court has held that copyright may not legally protect "ideas," but only the "form of expression." *See N.Y. Times Co. v. United States*, 403 U.S. 713, 726 n.* (1971) (Brennan, J., concurring). Copyright laws must also permit "fair use" of works that are not in the public domain. *Harper & Row*, 471 U.S. at 560. Copyright's protections—and the limitations on those protections—thus combine to "assure[] authors the right to their original expression, but encourage[] others to build freely upon the ideas and information conveyed in a work," promoting the "ends" of the Copyright Clause. *Feist Publ'ns., Inc.*, 499 U.S. at 349-50.

Given these limitations, *amici* certainly agree with petitioners that Congress could not eliminate the idea/expression dichotomy or the fair use doctrine. Pet. Br. at 35. *Amici* also agree that a content-based copyright act would not be immune from constitutional attack. *Id.* But the fact that some exercises of Congress's power under the Copyright Clause might, in some circumstances, violate speech-protection principles is no reason to apply heightened scrutiny to all exercises of Congress's power under that Clause.

In this case, the CTEA is *not* content based, and does *not* eliminate the idea/expression dichotomy or the fair use doctrine. Thus, there is no basis for the judicial intervention that heightened scrutiny would entail. Rather, because the CTEA is a core exercise of Congress's copyright power, reflecting a neutral policy choice by Congress regarding the appropriate duration of copyright, it should be considered a policy choice the Framers entrusted to Congress.

Thus, in enacting the CTEA, Congress plainly struck the "definitional balance" between the Copyright Clause and the First Amendment that this Court set forth in *Harper & Row*. Congress left intact the provisions of the Copyright Act of 1976, ensuring that only "original" expression is protected, *see* 17 U.S.C. § 102(a), and that the ideas and facts underlying that original expression remain in the public domain, *see id.* § 102(b), so that persons wishing to exploit unoriginal works, ideas, or facts may do so. Congress also kept intact the Copyright Act's provision ensuring that even original expression is subject to "fair" uses, *see id.* § 107, so that persons wishing to make fair use of protected original expression may do so. Petitioners may thus use the ideas contained in works protected by the CTEA, and may make "fair" uses of expression that is otherwise protected by the CTEA. As a result, petitioners cannot offer any reason to deem the CTEA

as less than fully protective of their First Amendment rights under *Harper & Row*.[16]

Instead, petitioners argue that "copyright law may be upheld against First Amendment challenge insofar—but only insofar—as it protects an 'engine of free expression,'" Pet Br. at 36-37 (quoting *Harper & Row*, 471 U.S. at 558), and that copyright law should be invalidated under the First Amendment if its restrictions "merely inhibit access to ideas without any countervailing benefit," *id.* at 37 (quoting *Sony*, 464 U.S. at 450-51). Petitioners' contention misapprehends the nature of Congress's power under the Copyright Clause, and this Court's precedents about how that power comports with the First Amendment's protections.

As an initial matter, the claim for heightened scrutiny proceeds from premises that are inapposite in the context of a copyright term extension—or of copyright itself. Thus, relying on *Turner*, petitioners contend that the CTEA can

[16] According to petitioners, *Harper & Row* does not apply to facial challenges to copyright statutes—but this notion has no support in *Harper & Row* or any subsequent case of this Court. Petitioners agree that the Court in *Harper & Row* "properly rejected The Nation's argument" that "it had a First Amendment right to trespass on Harper & Row's exclusive right." Pet. Br. at 34. But that conclusion was based on the definitional balance the Copyright Act of 1976 struck with the First Amendment, *see* 471 U.S. at 556 & 560, not on the particular method by which The Nation challenged that definitional balance. Under petitioners' view, if they—instead of filing this lawsuit—had simply republished works uniquely protected by the CTEA, they would have had no subsequent First Amendment defense to a claim of infringement. But petitioners fail to explain why *any* of the First Amendment interests they assert here would apply any less to Eldred-the-infringer (asserting a First Amendment right to copy expression protected by the CTEA) than to Eldred-the-challenger (also asserting a First Amendment right to copy expression protected by the CTEA). Such arbitrary line drawing finds no support in the First Amendment. It is the substance of the copyright protection that matters—not how a challenge is framed.

"withstand First Amendment review only … if it advances important governmental interests unrelated to the suppression of free speech." Pet. Br. at 39. But, of course, copyright itself inherently advances an important governmental interest—the promotion of progress—by means of restricting some speech: *i.e.*, the unauthorized copying of protected works. Thus, contrary to petitioners' contentions, allocations of copyright are not "wholly foreign to the First Amendment," Pet. Br. at 41 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)), or "mere assertion[s] of dysfunction or failure in a speech market," *id.* at 39 (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 640 (1994)). Rather, they reflect a choice made by the Framers and enshrined in the Copyright Clause of the Constitution. By stimulating the creation of "useful works for the general public good," *Harper & Row*, 471 U.S. at 558 (quoting *Aiken*, 422 U.S. at 156), copyright "itself" is an "engine of free expression." *Id.*

Second, applying *Turner* here would require this Court to second-guess all Congressional enactments affecting the scope and duration of copyright, in direct contravention of countless decisions of this Court repeatedly affirming that such decisions vest in Congress. *See, e.g., Fox Film Corp.*, 286 U.S. at 127; *Sony*, 464 U.S. at 431; *Pennock*, 27 U.S. at 17; *Diamond*, 447 U.S. at 317; *Parker*, 437 U.S. at 595; *Deepsouth Packing*, 406 U.S. at 529-30; *Stewart*, 495 U.S. at 228; *Bonito Boats, Inc.*, 489 U.S. at 168. There is no better example of the problematic nature of transferring such decision-making to the courts than the issues posed in a situation such as this, where Congress—relying on the sort of information and weighing the sort of factors best considered by the legislative branch—made the decision to extend copyright terms for the variety of reasons discussed in Section II, *supra*. This balancing must "be left to Congress," because it is "beyond the competence" of the courts. *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 413-14 & n.15 (1974).

Finally, petitioners argue that *Turner* scrutiny is appropriate because the expansion of copyright protection over time, along with changes in technology, have given copyright owners increased rights to control access to their work. Pet. Br. at 38. But the expansion of copyright protection reflects both the deference this Court properly affords Congress and Congress's consistent responsiveness to commercial, demographic, and technological changes in crafting copyright law. That expansion has created not a threat, but "an engine of free expression." Indeed, the emerging threat to creative expression is not Congressional protection of copyright in new media like the Internet, but the absence of those protections, given the low-cost, high-dose infringement that can occur via the Internet.

In the end, petitioners' contention that *Turner* should apply to the CTEA falls of its own weight.[17] Absent extreme cases, there are no judicially manageable standards to replace

[17] Even if *Turner* applied to core exercises of Congress's copyright power like the CTEA, the CTEA would still satisfy intermediate scrutiny. The overriding government interest here is Congress's desire to create "Progress" under Article I, § 8, an interest embedded in the Constitution. The only questions under *Turner* are whether the CTEA furthers the interests of Article I, § 8, and whether, in so doing, the CTEA burdens substantially more speech than necessary. *See Turner Broad. Sys.*, 512 U.S. at 662. Petitioners aptly frame the issue: "Such an incentive to create [more speech] could qualify as an 'important government interest' *if* Congress could reasonably have believed that the restriction it imposed through the CTEA's retroactive copyright extensions actually advanced the incentive to create." Pet. Br. at 41. As we explain above, Congress could—and did—reasonably believe that extensions of existing copyright create incentives for more speech.

Ultimately, there can be no denying that Congress drafted the CTEA with care and precision. It did not pick a twenty-year extension from a hat: rather, it pegged that extension to changes in life expectancy, commercial circumstances, and evolving international norms. No narrower legislation could have accomplished Congress's goals.

Congress's judgments regarding the economic, social, demographic and technological factors that have led it to extend copyright terms throughout history, and in many instances to make those extensions applicable to existing works. Moreover, such heightened scrutiny is unnecessary given the speech-protecting principles found in copyright law itself, *see, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 n.5 (1994), such as the idea/expression dichotomy and fair use doctrine. Treating copyright legislation like "all other regulation" under *Turner* ignores the presence of these built-in limitations and protections in Copyright Clause jurisprudence, and is at odds with this Court's holding in *Harper & Row*.

CONCLUSION

For the foregoing reasons, the decision of the U.S. Court of Appeals for the D.C. Circuit should be affirmed.

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